

LAW REVIEW¹ 25011

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Do Not Walk away from Substantial Reemployment Rights.

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

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Q: I am a Staff Sergeant (E-6) in the Marine Corps Reserve and a life member of the Reserve Organization of America (ROA). I have read

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 45 years, I have collaborated with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the Federal reemployment statute) for 38 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at <mailto:swright@roa.org>.

with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I joined your organization and became a life member because I want to support your efforts to inform and assist Reserve Component service members like me.

In the small city where I live, there are only two “fine dining” restaurants. Let us call them Quisling’s Norwegian Seafood Restaurant (QNSR) and Leroy’s Famous Steak House (LFSH). QNSR is one restaurant in a chain of 11 restaurants across our state. These restaurants are owned and operated by a man named Vidkun Quisling.

I worked for the QNSR restaurant in my city for exactly three years, from 1/1/2019 until 12/31/2021, when I left my civilian job to report to active duty. I was on active duty for exactly three years, from 1/1/2022 through 12/31/2024. I was released from active duty and returned to the status of a part-time Marine Corps Reservist.

I have read and reread your Law Review 15116 (December 2015). I believe that I have met and can document that I have met the five USERRA conditions for reemployment, except that I have not yet applied for reemployment. I think that the deadline for doing so has not yet passed.

In October 2018, I gave oral and written notice to the restaurant that I would be leaving my job at the end of December to report to active duty. I gave the notice to the manager of the QNSR restaurant in my city. I worked at the restaurant through 12/22/2018 when I left to report to active duty a few days later.

I have read and reread your Law Review 16043 (May 2016), concerning USERRA’s five-year limit. I believe that I have not exceeded the five-year limit with respect to my employer relationship

with QNSR. It is my understanding that the military duty that I performed prior to 1/1/2019, when I started the QNSR job, does not count toward my five-year limit with QNSR. During the three years that I worked for QNSR, the only military periods that I performed were drill weekends and annual training tours. It is my understanding that those periods do not count toward exhausting my five-year limit.

On 1/4/2025, just three days after I left active duty, I visited the QNSR restaurant in my city, the place where I worked for three years. Mr. Quisling, the owner-operator of the chain of restaurants, was at the restaurant when I visited. I had a short conversation with him. I told him that I had worked for the restaurant for three years, until I left in December 2021 to report to active duty, after having given prior notice to the restaurant manager. I told Mr. Quisling that I had only very recently been released from active duty and that I wanted to return to work for QNSR, preferably at the restaurant in the city where I live. Mr. Quisling told me that all 11 restaurants were fully staffed and that there was no way that I could be reemployed.

The next day, I visited LFSH, the other “fine dining” restaurant in the city where I live. Mr. Leroy Jones, the owner, offered me a job paying 2% more than what I was earning at QNSR when I left in December 2021. But at LFSH, unlike QNSR, there is no pension plan.

Am I entitled to reemployment at QNSR even if there is no current vacancy for me to fill? If I return to work for QNSR, am I entitled to be treated as if I had been continuously employed by the restaurant chain for purposes of the QNSR defined contribution pension plan?

Answer, bottom line up front:

First, you are entitled to reemployment at QNSR right now.

You have made a timely application for reemployment.

You have been entitled to reemployment since you visited the restaurant on 1/4/2025 and spoke to the owner. You told him that you had worked for the restaurant before and that you had left your job to go on active duty, and that you were now back home from active duty and seeking to return to work for the restaurant. That is all that you were required to say to apply for reemployment.³

Because you were on active duty for more than 180 days, you have 90 days, starting on the date that you were released from active duty, to apply for reemployment.⁴ For you, the reemployment application deadline is 3/31/2025. You have already made a sufficient application for reemployment, but out of an abundance of caution I suggest that you make a formal, written application. At the end of this article, I placed a sample application for reemployment letter.

You have not exceeded the five-year limit.

The five-year limit only counts service periods that are “with respect to the employer relationship for which a person seeks employment.”⁵ The military service periods that you performed before you started the QNSR job on 1/1/2019 do not count toward your five-year limit with respect to QNSR.

You are also correct that your drill weekends and annual training tours that you performed during your QNSR employment are exempt from the five-year limit.⁶ Your three-year voluntary active duty period, from

³ See 20 C.F.R. § 1002.118. This is part of the Department of Labor (DOL) USERRA Regulation.

⁴ 38 U.S.C. § 4312(e)(1)(D).

⁵ 38 U.S.C. § 4312(c).

⁶ 38 U.S.C. § 4312(c)(3).

2021 through 2024, probably counts toward your limit, but you still have two years of “head room” in your limit.

The fact that there is no present vacancy does not defeat your right to reemployment at QNSR.

Because you meet the five USERRA conditions, QNSR is required to reemploy you promptly in an appropriate position of employment *even if that means displacing or laying off another person*. The pertinent section in the DOL USERRA regulation is as follows:

Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. *The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee.*⁷

If filling the vacancy defeated the right to reemployment of the returning veteran, USERRA would be of little value. Many old and recent cases show that the right to prompt reemployment upon returning from service is not contingent on the existence of a vacancy at that time. The United States Court of Appeals for the First Circuit⁸ has held:

⁷ 20 C.F.R. § 1002.139(a) (emphasis supplied).

⁸ The 1st Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

Finally, we note that USERRA affords broad remedies to a returning servicemember who is entitled to reemployment. For example, 20 C.F.R. 1002.139 unequivocally states that “the employer may not refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee’s absence, even if reemployment might require the termination of that replacement employee.”⁹

The United States Court of Appeals for the Federal Circuit¹⁰ has held:

The department [United States Department of Veterans Affairs, the employer and defendant] first argues that, in this case, Nichols’ [Nichols was the returning veteran and plaintiff] former position was “unavailable” because it was occupied by another and thus it was within the department’s discretion to place Nichols in an equivalent position. This is incorrect. Nichols’ former position is not unavailable because it still exists, even if it is occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. ... Although occupied by Walsh, Nichols’ former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.¹¹

⁹ *Rivera-Melendez v. Pfizer Pharmaceuticals LLC*, 730 F.3d 49, 55-56 (1st Cir. 2013).

¹⁰ The Federal Circuit is the specialized federal appellate court that sits in our nation’s capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board.

¹¹ *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993). For other cases holding that the lack of a current vacancy does not excuse the employer’s failure to reemploy the returning veteran, I invite the reader’s attention to *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992); *Goggin v. Lincoln-St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983); *Davis v. Crothall Services Group*, 961 F. Supp. 2d 716, 730-31 (W.D. Pa. 2013); *Serricchio v. Wachovia Securities LLC*, 556 F. Supp. 2d 99, 107 (D. Conn. 2008); *Murphree v. Communication Technologies, Inc.*, 460 F. Supp. 2d 702, 710 (E.D. La. 2006); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 1011 (E.D. Mich. 1985); *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981); *Hembree v. Georgia Power Co.*, 104 L.R.R.M. (BNA) 2535 (N.D. Ga. 1979), affirmed in part, reversed in part on other grounds, 637 F.2d 423 (5th Cir. 1981);

Q: All QNSR employees participate in a defined contribution pension plan. Each employee is required to contribute 1% of his or her earnings, other than tips, into an account in the individual's name, and the employer, QNSR, matches those employee contributions. Each employee is permitted to contribute up to an additional 4% of his or her QNSR compensation, and QNSR matches those contributions as well.

During the three years that I worked for QNSR, from January 2019 through December 2021, I contributed 5% of my QNSR earnings to the pension account in my name, and QNSR matched those contributions. I did not take the money out of my account when I left my QNSR job in December 2021 to report to active duty. As far as I know that money is still sitting in that account.

If I return to work for QNSR as a reemployed veteran, what happens to my QNSR pension account?

A: Section 4318 of USERRA governs pension entitlements of returning service members and veterans who meet the five USERRA conditions for reemployment. Here is the entire text of that section:

(1)

(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under

Jennings v. Illinois Office of Education, 97 L.R.R.M. (BNA) 3027 (S.D. Ill. 1978, judgment affirmed, 589 F.2d 935 (7th Cir. 1979); and *Muscianese v. U.S. Steel Corp.*, 354 F. Supp. 1394, 1402 (E.D. Pa. 1973).

any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.

(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.

(2)

(A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

(b)

(1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during

the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated—

(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or

(B) if the sponsor does not provide—

(i) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer

throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed—

(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or

(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.¹²

¹² 38 U.S.C. § 4318. See generally Law Review 21059 (September 2021) and Law Review 20056 (June 2020) for a detailed discussion of section 4318;

Under section 4318(b)(1) of USERRA,¹³ QNSR will be required to pay into your pension account the amount of money that it would have paid into the account during the period of your most recent active-duty period, as if you had remained continuously employed by QNSR during that period. Under the Department of Labor (DOL) USERRA Regulation, DWI is required to make that payment “no later than 90 days after reemployment.”¹⁴

When you return to work for QNSR as a reemployed veteran, you should immediately resume making contributions to your pension account, and QNSR should resume matching those contributions. Moreover, *you should arrange to make make-up contributions to cover the period when you were away from your QNSR job for military service, and QNSR is required to match those contributions as well.* You have five years, starting on the date of your reemployment, to make up the missed employee contributions.¹⁵

Q: At QNSR, the “vesting” period is five years. Because I left QNSR employment after only three years, I am not vested in the QNSR pension account. How does this work?

A: Upon reemployment, you must be treated as if you had been continuously employed by QNSR during the time that you were away from your QNSR job for military service.¹⁶

Q: If I return to work for QNSR as a reemployed veteran, what is the rate of pay to which I am entitled?

¹³ 38 U.S.C. § 4318(b)(1).

¹⁴ 20 C.F.R. § 1002.262(a).

¹⁵ 38 U.S.C. § 4318(b)(2).

¹⁶ 38 U.S.C. § 4318(a)(2)(B).

A: You are entitled to the rate of pay that *you would have attained if you had remained continuously employed at QNSR.*¹⁷ This rate of pay will likely be substantially more than you were making from QNSR in December 2021 and substantially more than what the other restaurant has offered you.

Conclusion

You should not leave tens of thousands of dollars on the table by walking away from your right to reemployment at QNSR. If QNSR offers you cash to waive your USERRA rights, you should ensure that the amount of the offer is sufficient to cover all that you are losing by taking up another job instead of returning to QNSR. You need to retain a competent attorney to negotiate for you. Good luck, and please let me know how this turns out.

Please join or support ROA.

This article is one of 2,200-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. We add new articles each month.

ROA is the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members),

¹⁷ See Law Review 18081(September 2018).

the Army Reserve (176,171 members), and the Army National Guard (329,705 members).¹⁸

ROA is more than a century old—on 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.” One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide adequate national security. For more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

¹⁸ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

If you are now serving or have ever served in any one of our nation's eight¹⁹ uniformed services, you are eligible for membership in ROA,²⁰ and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at <https://www.roa.org/page/memberoptions> or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002²¹

Here is the format for a formal application for reemployment letter:

Mr. Vidkun Quisling
Quisling's Norwegian Seafood Restaurant
123 Dunkirk St.
Norway, KS 66612

Dear Mr. Quisling:

¹⁹ Congress recently established the United States Space Force as the eighth uniformed service.

²⁰ Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.

²¹ You can also contribute on-line at www.roa.org.

I worked for your restaurant in Clay Center, Kansas for three years, from January 2019 through December 2021. After giving prior oral and written notice to the manager of your Clay Center restaurant, I left my job to report to active duty in the United States Marine Corps. I served on active duty for three years and was released from active duty on 12/31/2024. I am now making a timely application for reemployment at your restaurant. I am enclosing a copy of the DD-214 form that I received from the Marine Corps when I was released from active duty.

I am entitled to reemployment under a federal statute called the Uniformed Services Employment and Reemployment Rights Act (USERRA). You can find USERRA in title 38 of the United States Code, at sections 4301 through 4335. For information about USERRA, you may wish to call the Department of Defense organization called “Employer Support of the Guard and Reserve” (ESGR), at 800-336-4590.

I also invite your attention to the website of the Reserve Organization of America (ROA), at www.roa.org/lawcenter. I invite your attention specifically to Law Review 15116.

Thank you for your prompt attention to my application. I look forward to returning to work for your fine restaurant quickly.

Very respectfully,

John Basilone
Staff Sergeant, United States Marine Corps Reserve